IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 25

CARDOX CORPORATION,

Petitioner,

vs.

C-O-TWO FIRE EQUIPMENT COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

Petitioner respectfully prays that this Court grant rehearing of its order of October 27, 1952, affirming by an equally divided court the judgment of the United States Court of Appeals for the Seventh Circuit.

The order of this Court affirming the Court of Appeals for the Seventh Circuit, while it is conclusive upon the parties to this case, is not "an authoritative determina-

tion for other cases", *United States* v. *Pink*, 315 U.S. 203, 216 (1942); *Hertz* v. *Woodman*, 218 U. S. 205, 213-214 (1910). Thus the order of this Court leaves unresolved the conflict between the decision of the Court of Appeals for the Seventh Circuit and the decision of the Court of Appeals for the Fifth Circuit in *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (1952).

Similar conflicts exist in decisions of District Courts (See Brief for Petitioner, pages 12-13, 18, 26).

The application of venue statutes to corporations in Federal courts has long presented difficulty. In *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168-169 (1939), this Court said:

> "When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law."

This Court's decision in the *Neirbo* case summarizes the history of the metaphorical judicial reasoning by which such procedural problems were approached. The decision was that although the defendant corporation did not "reside" in a district other than that in which it was incorporated, it could be sued in any Federal district in which it had consented to be sued in State courts by appointing an agent for the service of process as a condition for securing a license to do business in a state.

Subsequently this Court in *Suttle* v. *Reich Brothers*, 333 U.S. 163, 168 (1948), made it clear that the *Neirbo* decision did not change the settled law that the residence of a corporation within the meaning of the venue statutes was only in the state of its incorporation; and this Court

pointed out that Congress had similarly understood and employed the word "residence".*

A few months after this Court's decision in the *Suttle* case, Congress passed the new Judicial Code and took the final step which broadened the meaning which both Congress and this Court had given to corporate "residence" for over half a century. Whereas in March, 1948,

* "The 'residence' of a corporation within the meaning of these statutes has frequently been the subject of consideration by this Court for a period of over half a century. Shortly after Congress had enacted § 51 of the Judicial Code in substantially its present form, this Court declared that the 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated.' Thus, in Shaw v. Quincy Min. Co. 145 U.S. 444, 450, 36 L. ed. 768, 771, 12 S. Ct. 935 (1892), it was said: 'This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicil, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.'

"For almost sixty years, in an unbroken line of decisions, this Court has applied the same construction. That view was reaffirmed as recently as 1946 in the opinion of the Court in Mississippi Pub. Corp. v. Murphree, 326 U.S. 433, 441, 90 L. ed. 185, 189, 66 S. Ct. 242.

"Congress has revealed a similar understanding of the term 'residence' when enacting special venue statutes in situations in which it was intended that, at the election of the plaintiff, a corporation should become amenable to suit either in the State of incorporation or in States in which it is carrying on corporate activities. In those statutes, Congress has provided that the venue of such suits should be located not only in the district in which the corporation is a 'resident' or an 'inhabitant,' but also in districts in which it may be 'found', 'transacts business,' or has an agent to receive service of process.

"Nor does the decision of this Court in Neirbo Co. v. Bethlehem Shipbuilding Corp. 308 U.S. 165, 84 L. ed. 167, 60 S. Ct. 153, 128 ALR 1437 (1939) require that the term 'residence' be construed differently. In that case, the plaintiffs, citizens and residents of New Jersey, brought suit based on diversity of citizenship against the defendant, a Delaware corporation, in the Southern District of New York. This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code, the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit 'was not brought "in the district of the residence of either the plaintiff or the defendant."' "
(333 U.S. 163, 166-168)

this Court stated the existing law that "the 'residence' of a corporation, within the meaning of the venue statutes is only in 'the state and district in which it has been incorporated'" (333 U.S. 166), Congress declared that effective September 1, 1948 "any judicial district in which * * * (a corporation) is incorporated or licensed to do business, or is doing business * * * shall be regarded as the residence of such corporation for venue purposes" (28 U.S.C. 1391(c)).

Congress thus recognized and provided for the realities of corporate activities in more than one state. The opinion of the Court of Appeals for the Seventh Circuit has disregarded the clear statutory enactment.

In providing for venue in patent cases, Congress has never granted to corporations special privileges or immunity from process. Likewise in the new Judicial Code, no distinction is made between a corporation and a natural person. Either may be sued where it resides.

The history of the patent venue acts is reviewed in *Stonite Products Co.* v. *Lloyd Co.*, 315 U.S. 561 (1942) and in *Re Hohorst*, 150 U.S. 653 (1893). From 1789 (1 Stat. at L. 79) until the Act of 1887 (24 Stat. at L. 552), venue existed in the District in which the defendant was an inhabitant or "was found". No distinction was made between natural persons and corporations. No distinction was made between patent cases and other cases. By the Act of 1887, the general venue provisions were amended limiting venue to the residence of the defendant except in diversity cases in which it might also be laid in the residence of the plaintiff. Conflicting decisions then occurred on the question of whether venue in patent cases was restricted by the restrictive Act of 1887. This conflict was laid at rest by the special Act of 1897 (29 Stat. at L. 695) providing that in patent cases venue could be had not only

in the district of residence of the defendant, as in the general venue statute, but also in a district in which infringement had occurred, and the defendant had a regular and established place of business. This Act expressly recognized that the same rule was to be applied to every defendant "whether a person, partnership or corporation'. Since 1897, venue in patent cases has, therefore, been *broader* than the general venue.

In amending and re-enacting the patent venue provision (28 U.S.C. 1400(b)), there was no intent to distinguish between natural persons and corporations. Each may be sued where he or it resides. Where the defendant is a natural person, the effect of the decision of the Court of Appeals for the Seventh Circuit is to leave venue in patent infringement actions broader than the general venue, but where the defendant is a corporation, the effect of the decision is to provide for the first time venue against a corporation in a patent infringement action which is narrower than the general venue provision as to corporations—whereas in other actions a corporation may be sued in whatever districts it resides, in patent infringement actions, this cannot be done. This result is reached even though the patent venue section specifically provides that it is residence and not state of incorporation which determines venue.

The result of this Court's order is to grant a special immunity to corporations within the several districts of the Seventh Circuit, whereas that immunity is denied to corporations within the several districts of the Fifth Circuit by virtue of *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (C.A. 5, 1952). In the remaining districts in other circuits, one suing a corporate defendant under any of the special venue statutes will not know without suit whether the prospective corporate defendant is to be granted a special immunity or not. Until this Court

speaks, the confusion will continue as to whether a corporation resides where Congress clearly and unambiguously stated its residence to be "for venue purposes", or whether the silence of the Reviser's Notes and speculations as to what Congress may have intended, but did not say, shall control.

Petitioner respectfully submits that granting of this Petition for Rehearing and an authoritative determination of the issue for other cases is of real importance to the Federal Courts, litigants and the bar. However, in the event that rehearing still would result in an equally divided Court, Petitioner prays that this Court grant it permission to apply to the Court of Appeals for the Seventh Circuit for rehearing, including permission to apply for rehearing *en banc*. The Court of Appeals for the Fifth Circuit, before reaching its decision in *Dalton* v. *Shakespeare Company*, 196 F. (2d) 469 (1952) had the opportunity to consider the majority and minority opinions of the Court of Appeals for the Seventh Circuit. In the event that the issue cannot be resolved by this Court, Petitioner desires to afford the Court of Appeals for the Seventh Circuit the opportunity to re-examine its decision and to consider the decision in *Dalton* v. *Shakespeare Company*.

Respectfully submitted,

GEORGE I. HAIGHT,

ANDREW J. DALLSTREAM,

FREDRIC H. STAFFORD,

JOHN W. HOFELDT,
Attorneys for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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Attorney for Petitioner